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In the Supreme Court of the United States

No. 320

OCTOBER TERM 1947.

LINCOLN ELECTRIC COMPANY,

Appellant,

vs.

JAMES V. FORRESTAL,

Appellee.

On Appeal from the District Court of the United States For the District of Columbia.

APPELLANT'S BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM.

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On Appeal from the District Court of the United States For the District of Columbia.

APPELLANT'S BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM.

The antidote for the motions to dismiss or affirm is in Pomeroy's[1] introductory chapter. As that view of the centuries shows, equity was born to provide a remedy for the litigant otherwise left, as here, to an uncertain fate.

Appellee, however, thinks (1) appellant has lost its rights because it did not, after this cause was at issue, dismiss to pursue the subsequently enacted Tax Court remedy, (2) there are remedies elsewhere—they are called adequate even though the concession is made that in no other forum would *all* questions be open to challenge—and (3) the suit is one against the United States.

If it so be held, it will not be because of anything this Court has yet ruled in any case. To the contrary, it will be in defiance of principles here repeatedly declared.

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[1] *Equity Jurisprudence,* Fifth Edition, Chapter 1, Sections I and II, pp. 1-91.

Inspection of appellee's argument will show that this is so.

I. SUBSEQUENTLY ENACTED TAX COURT REMEDY DID NOT DESTROY RIGHT TO MAINTAIN SUIT.

The weight of appellee's argument (appellee's brief,[2] pp. 5-8) rests upon the point that because appellant "failed to pursue its remedy in the Tax Court" its claim now is foreclosed. The argument is without merit:

1. Statute Created Dilemma Fortifying Claim to Equity Court's Protection.

Far from calling for dismissal, the subsequent amendment of the statute to permit suit in the Tax Court, itself created for appellant such peril of loss of rights as to fortify its call upon equity.

Let it be remembered that when this case was brought the Tax Court remedy was *not* available. The cases discussing it, and now relied upon for dismissal—although they do not deal with the problems this suit raises—lay far in the future.[3] Appellant at that stage had exhausted *all* administrative remedies. But, when, four months after the suit was brought and after the case was at issue, the Tax Court statute was enacted, this litigant plainly was confronted with a grave dilemma:

1. If it failed to file suit in the Tax Court, it faced the danger that it would—as now has happened upon the trial court's reversal of its earlier holding, 56

~~[2] The references are to the manuscript pages, appellee's brief being not yet in print.~~

[3] Even if those cases had rendered sure, as they do not, the Tax Court's power to give relief without attendant danger of loss of rights, this, as *Dawson v. Kentucky Distilleries & Warehouse Co.* (1921), 255 U. S. 288, 295-6, shows, would not have terminated appellants' right to the protection of the equity court, nor would it have warranted dismissal of the suit already pending.

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F. Supp. 308—be held not to have exhausted the administrative remedy, but

2. If it filed in the Tax Court, it faced the peril that it thereby would be held to have *waived* its right to challenge the statute on constitutional grounds and to have committed *final* decision of its rights to an administrative tribunal.

Appellant was in a pleasant position—between Scylla and Charybdis.

There was nothing unreal in the first peril. This is proved by what has happened. The suit has been dismissed on that very ground.

But the second peril was equally real.

The statute, while purporting to say that one circumstanced as was appellant, Section 403(e)(2), "*may*[4] • • • file a petition" in the Tax Court, appended to that grant the proviso, Section 403(e)(2), that "**Upon such filing,**" decision there "**shall be final and conclusive** and shall not be subject to review or redetermination by any court or other agency." Sections 403(e)(1) and 403(e)(1). It is no answer to say (p. 12-13 of appellee's brief) that if the Tax Court's decision cannot constitutionally be made final, appellant will not be hurt, whereas if it can appellant has no right to complain. The point is that constitutional rights *can be waived.*

To the peril—or even to the uncertainty—of such waiver, appellant cannot rightly be forced.

—(a) Peril of Loss of Rights Real, as Cases Show.

This danger of forfeiture, appellee would turn aside on the ground that by going to the Tax Court (p. 7 of appellee's brief) "Appellant would be seeking no license, franchise, or special benefit • • •." The peril is not lim-

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[4] Emphasis supplied throughout the brief.

ited to such cases. Rights may be lost by the mere filing of a proceeding.

Witness *Cappellini* (1929), 14 B. T. A. 1269, who, for doing no more, forfeited his rights.

Formerly, to assert a transferee liability in tax cases, the Commissioner had to proceed by bill in equity or suit at law against the transferee. To simplify the procedure, Congress enacted Section 280 of the Revenue Act of 1926, authorizing the Commissioner to issue notice of deficiency directly against the transferee "in the same manner and subject to the same provisions and limitations as in the case of a deficiency * * *." Cappellini, therefore, filed his petition with the Board of Tax Appeals, complaining, among other things, that the assessment of transferee liability was unconstitutional. And, even though both sides (p. 1271) "urged that the Board not only has the power, but it is its duty" to pass upon the constitutional questions, the Board found the rights were gone. It said (p. 1276):

> "It is a sufficient answer that constitutional rights may be waived * * * and if any constitutional rights of petitioners are violated by section 280 they have *waived* them **by initiating the proceeding** permitted by that section."

The Board has applied the same principle in at least 42 other cases.[5]

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[5] See for example: *D. E. Wheeler* (1929), 16 B. T. A. 96; *Woodley Petroleum Co.* (1929), 16 B. T. A. 253; *A. Cellers* (1929), 16 B. T. A. 411; *G. G. Small* (1929), 16 B. T. A. 658; *Phil Gleichman* (1929), 17 B. T. A. 147; *John Robert Brewer* (1929), 17 B. T. A. 713; *James Duggan* (1930), 18 B. T. A. 608; *Bruce McDonald* (1930), 18 B. T. A. 800; *Sarah M. Hadley* (1930), 19 B. T. A. 74; *White Eagle Oil & Refining Co.* (1930), 19 B. T. A. 185; *Lottie Essex* (1930), 19 B. T. A. 275; *Joseph A. Steinle* (1930), 19 B. T. A. 325; *J. H. Johnson* (1930), 19 B. T. A. 840; *J. T. Crane* (1930), 19 B. T. A. 881; *John Thomson, Jr.* (1930), 20 B. T. A. 1, 45; *McGowin-Foshee Lumber Co.* (1930), 20 B. T. A. 223; *Stoney Amick* (1930), 20 B. T. A. 501; *Stewart Forshay* (1930), 20 B. T.

(Continued on following page)

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This is not merely Tax Court doctrine.

The Court of Appeals of the District of Columbia applied the same rule in *Hirsh v. Block* (App. D. C., 1920), 267 Fed. 614, reversed on other grounds, 256 U. S. 135. There, in answer to the argument here advanced by appellee, that the litigant (p. 618) "should have pursued the remedy prescribed in the act, and, if unsuccessful, appeal," the court declared (p. 618):

> "plaintiff would be in poor position to question the jurisdiction which he had himself invoked, merely because of an adverse decision. If he should invoke the aid of the statute, and suffer defeat before the commission, **he would estop himself** to seek further relief on the ground of the unconstitutionality of the act."

For the same reasons, this Court held the complainant had waived its rights in *Great Falls Manufacturing Company v. The Attorney General* (1888), 124 U. S. 581. By act of Congress, land was appropriated for the use of the United States, unconstitutionally as the owner claimed. The statute authorized suit in the Court of Claims. The owner, challenging the taking as unconstitutional, filed an equity bill in the Circuit Court, and filed also, on the last day permitted by the statute, suit in the Court of Claims

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(*Continued from preceding page*)

A. 537; *South Penn Oil Co.* (1930), 20 B. T. A. 1180; *Lillian Burke* (1930), 21 B. T. A. 45; *W. E. Lamm* (1930), 21 B. T. A. 107; *Lillie M. Jones* (1930), 21 B. T. A. 275; *American Locker Co.* (1930), 21 B. T. A. 408; *Virginia Chase Weddell* (1930), 21 B. T. A. 411; *Frank Shlaudeman* (1930), 21 B. T. A. 605; *E. J. Lorie* (1930), 21 B. T. A. 612; *Lulu Vance Baumgartner* (1930), 21 B. T. A. 623; *Charles M. Howell* (1930), 21 B. T. A. 757; *Ezra Gould* (1930), 21 B. T. A. 824; *Kentucky Oil Corporation* (1931), 21 B. T. A. 1150; *Guy W. Renyx* (1931), 21 B. T. A. 1248; *J. E. Duval* (1931), 21 B. T. A. 1357; *F. E. McGlone* (1931), 22 B. T. A. 358; *R. W. Crosman* (1931), 22 B. T. A. 390; *Wayne Body Corporation* (1931), 22 B. T. A. 401; *Charles S. Rauh* (1931), 22 B. T. A. 662; *The Newport Company* (1931), 22 B. T. A. 833; *William A. Moorhead* (1931), 22 B. T. A. 858; *Edward H. Garcin* (1931), 22 B. T. A. 1027; *George J. Delmege* (1931), 22 B. T. A. 1059; *B. D. Van Meter* (1931), 22 B. T. A. 1202; *Continental Oil Company* (1931), 23 B. T. A. 311.

(p. 600) "from fear that, if it did not file * * * it might lose the right to demand compensation for its property." *Because it did so,* it lost its right to question the constitutionality of the taking. It did so, this Court said (p. 599), "**By the very act of suing** in the Court of Claims * * *." The Court said (p. 599):

> "plaintiff has voluntarily accepted the provisions of the act,"

and considered it (p. 600):

> "immaterial that the plaintiff invoked the jurisdiction of the Court of Claims from fear that, if it did not * * * it might lose the right to demand compensation * * *."

In re Fassett (1892), 142 U. S. 479, teaches the same lesson. A yacht was seized, wrongfully the owner thought, for customs duties. When he challenged the seizure in the district court, it was claimed his only remedy lay by appeal from the Collector to the Board and then to the courts. Under the statutes the Board was given jurisdiction to decide (p. 487) "the rate and amount" of the tax, much as the Tax Court under the present statute is given jurisdiction to decide the "amount, if any, of such excessive profits * * *." And even though, unlike the case here, a limited review by the courts was provided, the court upon that review could not (p. 487) "pass upon any question which the collector had no original authority to determine."

Therefore, said the Court, the own[illegible] who claimed his yacht was unlawfully seized, could properly petition the district court for its recovery and that to do otherwise would entail possible loss of rights because (p. 487):

> "Under the Customs Administrative Act, the libellant, in order to have the benefit of proceedings thereunder, must **concede** that the vessel is imported merchandise, which is the very question put in contention under the libel * * *."

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So here, even though the Congress could not make the Tax Court's decision unreviewably final at the cost of constitutional rights, a litigant obviously could concede that finality.[6] One who brings a proceeding brings it subject to the conditions imposed. A "plaintiff may not • • • contest the constitutionality of the conditions imposed." *Upchurch Packing Co., Inc. v. United States* (5 C. C. A., 1945), 151 F. (2d) 983, 985.

In any event, to ask appellant to rely upon assurances (pp. 7-8 of appellee's brief) that no constitutional rights would be sacrificed in the process, is to ask it to determine for itself that these cases, and others set forth in the jurisdictional statement (pp. 10-21), which never have been disavowed, henceforth are to be considered overruled.

—(b) Resort to Administrative Process Required Only Where Rights Secure.

It is a different matter where the circumstances are such that resort to the administrative process will not work loss of rights.

Where the statute itself provides for full review, with protection for all rights, pursuit of that course will work no waiver, *Oklahoma v. United States Civil Service Com-*

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[6] Appellee's appeal to authority (pp. 7-8 of appellee's brief) to support the point contended for is misplaced. He takes the gloss for the rule. Because a railroad cannot abandon an intrastate train service, *St. Louis-San Francisco Railway Company v. Alabama Public Service Commission* (1929), 279 U. S. 560, or move its shops, *Lawrence v. St. Louis-San Francisco Railway Company* (1927), 274 U. S. 588, without first applying to the state public service commission for leave, when, unlike the case here, 279 U. S. 560, 563, "No constitutional right could have been prejudiced by so doing," and, 274 U. S. 588, 592, when "No right or interest of the Railway would have been prejudiced by participating in the hearing • • •," it does not follow that when, as here, the hazard of such prejudice is clearly written in the cases, resort still must be had to the administrative process. The clear implication is the other way around.

~~[7] References to the jurisdictional statement, which is not yet in printed form, are to the filed typewritten copy.~~

mission, (1947), 330 U. S. 127, 139, nor is there reason for another choice where "the statute itself provides an expeditious means of testing the validity * * * without necessarily incurring any of the penalties * * *," *Yakus v. United States* (1944), 321 U. S. 414, 438, and where every right "may be heard and determined * * * in the course of the prescribed administrative procedure * * *," *Anniston Manufacturing Co. v. Davis* (1937), 301 U. S. 337, 346; *Myers v. Bethlehem Shipbuilding Corp.* (1938), 303 U. S. 41, 48.

The point is that here appellant was put to the hazard of loss of all its rights. This alone, as this Court, as recently as *Aircraft & Diesel Equipment Corporation v. Hirsch* (1947), 67 Sup. Ct. 1493, 91 Law ed. Adv. Op. 1313, decided June 16, 1947, recognized, is adequate "to dispense with exhausting the administrative process * * *."

2. Congress Itself Differentiated—It Did Not Destroy Right to Maintain Suit.

There is, moreover, solid ground for thinking that Congress did not intend the statute to apply as an inescapable condition precedent to litigants circumstanced as was this appellant.

Congress differentiated.

While saying as to others that the Board's decision, Section 403(c)(1), "**In the absence of** the filing of a petition with the Tax Court * * * shall be final * * *," it did *not* say so in the case of persons circumstanced as was this appellant. It appeared to put them in a different category by saying that such persons, Section 403(e)(2), "*may* * * * file a petition * * *."

This alone marks this as a case apart from *Aircraft*. In *Wade*[8] the point could not arise because he in fact *had*

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[8] *Wade v. Stimson* (1947), 67 Sup. Ct. 1727, 91 Law ed. Adv. Op. 1391, decided June 16, 1947, on the authority of *Aircraft*.

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filed in the Tax Court. Nor could it arise in *Waterman* (1946), 327 U. S. 540, because no order had there been issued. *Mine Safety* (1945), 326 U. S. 371, the only other renegotiation case which has been here, turned upon a different point.

That Congress did intend a different result seems all the more likely in view of the fact that in other respects also it differentiated between persons already subjected to an order, as was this appellant, and others against whom orders might issue as to later years. To cite only two examples, the Congress (1) provided[9] that the standards written into the 1944 act should not apply to a case such as this and (2) made inapplicable[10] to litigants such as this appellant the indemnity of the United States so largely relied upon in deciding *Aircraft*.

Because Congress thus, elsewhere in the statute so differentiated, added significance is given to the difference in language used in providing the Tax Court remedy. There is, indeed, reason, as the legislative history[11] shows, to think that Congress never thought it was by the original act giving to an administrative officer the broad and unrestrained power of compulsory seizure which appellee has read the statute to authorize. This alone would be enough, and an understandable ground, for the apparent difference in treatment which Congress wrote into the statute. In any event there is no reason for thinking Congress was careless of language. And, in seeking to give

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[9] Section 403(a)(4)(A) as amended, and Section 701(d) of the Revenue Act of 1943.

[10] Section 403(c)(2) as amended, and Section 701(d) of the Revenue Act of 1943.

[11] This history is much too long to set forth here. It is discussed in the briefs filed in the court below. It illuminates the questions—not decided in any case this Court has had—with which this case bristles. It serves also to mark the great probability that wrong has been done by the court below in reading the congressional mandate.

effect to the congressional intent, there is, of course, need to pay attention to the choice of language.

3. Subsequently Provided Remedy Does Not Affect Jurisdiction Once Attaching.

Moreover, even if otherwise applicable, the subsequently provided remedy could not operate to oust a jurisdiction once attaching as it indubitably did when this suit was filed. Equity does not lose jurisdiction "because since the filing of the bill an adequate legal remedy may have become available," *Dawson v. Kentucky Distilleries & Warehouse Co.* (1921), 255 U. S. 288, 296; *American Life Insurance Co. v. Stewart* (1937), 300 U. S. 203, 215. The trial court, upon its initial consideration, when the first motion was filed and rejected, agreed, pointing out that "The right to go to the Tax Court did not accrue until long after this suit was instituted, and even if it be considered that the relief afforded by the Tax Court provision is obligatory and exclusive, that certainly is not the case where, as here, it did not exist when suit was brought." 56 F. Supp. 308, 310.

—(a) Congress Expressly Refused to Close Court's Doors.

To the point that a subsequently enacted statute ordinarily will not be held to disturb a jurisdiction once attaching, appellee's answer (p. 19 of appellee's brief) is that the statute "deprives those courts of jurisdiction in pending cases." The fact is that the proposal that the doors of the courts be shut upon renegotiation matters was expressly rejected by Congress. Thus, when the revision which brought forth the Tax Court remedy was under consideration, Senator Truman, from the floor of the Senate, offered an amendment specifying that (90 Cong. Rec. 506):

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"Such petition shall constitute the exclusive method of review • • • and *no suit brought for the purpose of restraining a renegotiation* or the enforcement thereof, or the withholding or recovery of any amounts pursuant thereto, or for the purpose of compelling any actions in disregard of a renegotiation **shall be maintained in any court**, nor shall any renegotiation be set aside or disregarded in any suit or action in any court."

The amendment was ruled out of order but was pressed again. 90 Cong. Rec. 530-5. It brought a storm of disapproval and "was *rejected.*" 90 Cong. Rec. 535.

Where Congress has expressly refused to oust the jurisdiction of the courts and instead has chosen language appropriate in the case of the limited group circumstanced as was this appellant, to grant a right rather than to destroy a traditional jurisdiction already existing, it is no answer to say that, because Congress may grant or withhold jurisdiction, it has done so here. Authorities (p. 7 of appellee's brief) such as *Smallwood v. Gallardo* (1927), 275 U. S. 56, *Hallowell v. Commons* (1916), 239 U. S. 506, *Kline v. Burke Construction Co.* (1922), 260 U. S. 226, *Van Horne v. Hines* (App. D. C., 1941), 122 F. (2d) 207, certiorari denied 314 U. S. 689, are, therefore, beside the point.

Indeed, appellee's argument that jurisdiction has been destroyed is at variance with his admission below that, notwithstanding appellant's failure to go to the Tax Court, the court below still had jurisdiction to decide "in this proceeding" the constitutional questions (see jurisdictional statement, p. 18, note 19). The same admission was repeatedly made by appellee upon the oral argument below (see oral argument, January 13, 1947, pp. 66-7, 73-4, 104).[12]

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[12] For example, appellee's argument was (pp. 66-7):

"MR. SIEGEL: I do *not* challenge their right to raise the question of the validity of this Act, on its face, in this proceeding. • • •

(Continued on following page)

Likewise misplaced is appellee's assertion (p. 8 of appellee's brief) that "Similar rulings have been issued in the case of other statutes." Because exhaustion of the administrative process will be compelled (p. 8 of appellee's brief) as in:

Newport News Shipbuilding & Dry Dock Co. v. Schauffler (1938), 303 U. S. 54, where (p. 57) "The Act does not purport to leave the determination wholly to the Board. It • • • provides for judicial review by the Circuit Court of Appeals,"

Myers v. Bethlehem Shipbuilding Corp. (1938), 303 U. S. 41, where (p. 48) "the Act provided for • • • opportunity to secure judicial protection,"

United States v. Ruzicka (1946), 329 U. S. 287, where the statute permitted (p. 291) "review before the appropriate district court,"

it does not follow that, where loss of rights is, as here, plainly prophesied by the cases, a litigant will be dismissed to confront those very perils.

Plainly the cases are not "similar."

4. Questions Thus Arising Not Foreclosed by Other Cases Which Have Been Here.

These problems have not been considered in any of the renegotiation cases which have been here. They could not be. The factual situations were not such as to permit them to be raised. It is idle, therefore, to suggest, as does

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(*Continued from preceding page*)

JUDGE BAILEY: Is it your position then that we cannot in any event determine whether or not the profits were excessive?

MR. SIEGEL: Cannot, Your Honor?

JUDGE BAILEY: Yes.

MR. SIEGEL: Correct.

JUDGE BAILEY: But, *we can determine whether the whole Act is constitutional or unconstitutional.*

MR. SIEGEL: That is correct."

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appellee (p. 5 of appellee's brief) that this case is governed by those earlier cases. It is not.

Of course the Court did not (appellee's brief, pp. 7-8) "intend to set a trap" for the litigants in those other cases. These questions did not even lurk in those cases. Thus:

Coffman (1945), 323 U. S. 316, dealt with a different statute, which itself provided for adjudication in the courts (p. 320). Moreover, Coffman failed to establish jurisdiction in equity on other grounds. All he needed to do was sue his one customer—who was not even asserting the defense of the statute. He could do so, moreover, freed from the hazards confronting this appellant.

Mine Safety (1945), 326 U. S. 371, turned on a different point. But even there, as the Court recognized (p. 373), "had the factual allegations supported these contentions [as they undeniably do here], the complaint • • • would • • • have provided a basis for the equitable relief sought."

Waterman (1946), 327 U. S. 540, was not even faced with an order. He accepted the statute. His fear was that the Board might read it too broadly. At best Waterman faced (p. 545) "future contingencies." Here they are present—now.

Aircraft and *Wade* had filed in the Tax Court. Their petitions were there pending. Whatever risk that entailed had already been incurred. It is obviously quite a different matter to *force* a litigant into that position where it is not certain that his rights will not be sacrificed in the process.

And, of course, in none of these cases were the actions pending—as was the case here where the cause already was at issue—when the Tax Court statute was passed.

In short, the situation which confronted this appellant, and which rendered doubtful the possibility of getting a

determination of its rights otherwise or elsewhere, save at the sacrifice of constitutional rights, was precisely that which it has been the great mission of equity to relieve. 1 POMEROY'S *Equity Jurisprudence*, Fifth Edition, p. 241, note 19. This alone, as this Court's cases show (see cases set forth in the jurisdictional statement, p. 21) is warrant enough for appellant's presence here.

II. APPELLANT ELSEWHERE WITHOUT REMEDY.

Appellee by use of quotation marks creates the illusion (appellee's brief, p. 7) that the court below held "there was no sufficient basis in the claim of multiplicity to sustain equity's assumption of jurisdiction." The court held no such thing. As it clearly declared (see opinion, July 14, 1947), it dismissed because of appellant's failure to go to the Tax Court. Appellant, the court held, failed "to pursue its administrative remedy * * *."

Since the court did not say otherwise, there is no reason to think it abandoned its earlier opinion, rejecting all suggestion that elsewhere there lay a remedy. 56 F. Supp. 308, 310.

1. Appellant Faced with Threat of General Levy Upon Its Customers.

Appellee's argument that there is no danger of a general levy rests upon a maneuver.

When the order was issued and this case filed, the threat which confronted appellant was that unless it paid appellee would execute the order forthwith (see order of October 23, 1943, R. Vol. I, pp. 11-2, paragraph 34, Transcript, pp. 272-3):[13]

> "without further notice to you, by directing the withholding of amounts otherwise due to you * * * by

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[13] References to the transcript are to the pages as numbered in the transcript certified to this Court.

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the Government and by prime contractors with the Government."

The threat thus was to make a general levy upon appellant's customers.

—(a) Claimed Repentance Does Not Neutralize Threat.

Appellee now hints that there is nothing to such fears. This is based upon the fact that on January 13, 1944, long after the suit was filed, appellee wrote appellant a letter purporting to abandon the threat to move against appellant's customers. This is what he said (R. Vol. I, pp. 13-4, paragraph 39, Transcript, pp. 274-5):

> "Reference is made to my letter to you of October 23, 1943, in which I found and determined that $3,250,000 of the profits realized by you during the year ended December 31, 1942, under your contracts and subcontracts pursuant to the provisions of said Section 403, are excessive, plus such amount of the costs recorded in your books for such year which eventually are disallowed by the Bureau of Internal Revenue.
>
> The last paragraph of my letter as aforesaid advised you as follows:
>
> > 'Unless action is taken by you not later than November 5, 1943, to eliminate such excessive profits in a manner satisfactory to me, appropriate action in this respect will be taken by me without further notice to you, by directing the withholding of amounts otherwise due to you, as a contractor or subcontractor, by the Government and by prime contractors with the Government.'
>
> As action has not been taken by you to eliminate such excessive profits, I have further considered the appropriate action in this respect to be taken by me. The elimination of the amount of your excessive profits, remaining after the allowance of the tax credit under Section 3806 of the Internal Revenue Code, can, it is believed, be accomplished by directing the with-

> holding of amounts otherwise due to you by the Government. I find that it will be appropriate to eliminate the excessive profits, without further notice to you, by that method. I do not propose to eliminate such excessive profits by directing the withholding of amounts otherwise due to you by prime contractors with the Government. You are accordingly so advised."

The purported retraction, it is to be noted, is not even unqualified. As the letter has it "it is believed" that the order could be so enforced. At best it was the expression merely of a then present belief that the order could be executed by levying upon appellant's funds in the hands of the Government.[14]

However that may be, the difficulty with the attempted change of position is that repentance came too late. The case already had been pending for more than two months. A court **"is not divested of power because a defendant suspends his wrongdoing when he is sued,** or protests his good intentions for the future." *Vaughan v. John C. Winston Co.* (10 C. C. A., 1936), 83 F. (2d) 370, 373. Nothing short of conduct irrevocably putting it beyond appellee's power ever again to assert the threat, could effectively remove it. Moreover, if appellee could so withdraw his earlier threat, there would be nothing to prevent his later withdrawal of the retraction. He would "be free to resume the use of this illegal plan were not some effective restraint made." *Walling v. Helmerich & Payne, Inc.* (1944), 323 U. S. 37, 43. And one asserting, as does appellee, the validity of the statute, is hardly in position to disavow the

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[14] All of the contracts upon which appellant was renegotiated, had been paid in full before the order was issued, save for $5,000 which remained unpaid, and $3,500 which had been charged off as bad debts (R. Vol. I, p. 10, paragraph 32, Transcript, p. 271). What appellee proposed to do was to seize, not the proceeds of the contracts here in question, but appellant's money—that is, sums "otherwise due to you [appellant]"—arising from entirely disassociated transactions and wherever it might be found.

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obligation to collect the balance, should the funds held by the Government prove insufficient, as they admittedly are.

The trial court rejected the argument that there is no longer danger of a general levy, when it ruled on the initial motion, 56 F. Supp. 308, and, having said nothing further, there is no reason to think it thereafter suffered a change of heart.[15] Plainly the eleventh-hour maneuver to defeat jurisdiction is itself a striking admission of its existence.

—(b) Appellant Still Exposed to Same Peril as it Originally Faced.

Nor can appellee be heard to say that, whatever may have been the situation when suit was filed, there no longer are "prime contractors" upon whom he could levy. This is because, in the view of the renegotiation authority, "once a prime contractor, always a prime contractor." Appellee made this clear upon the argument below. Thus, it was stated on behalf of appellee (oral argument, January 13, 1947, p. 82):

> "JUDGE GRONER: Can there be such a thing as a prime contractor now, involving government contracts?
>
> MR. SIEGEL: There can, for this reason: Beginning some time in August, 1945, I understand the Renegotiation agencies have taken the view that 'prime contractors' include *any* prime contractor of the United States, *even though his business* with the United States —contractor subject to renegotiation—*is of a commercial character* and not arising out of the war at all * * *."

This is settled renegotiation doctrine. *Lord Manufacturing Co. v. Stimson*, No. 36572 on the docket of the

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[15] As one of the judges said upon the oral argument which led to the dismissal on the sole ground of appellant's failure to pursue the administrative remedy (oral argument, January 13, 1947, p. 131):

> "I don't think that the so-called assurance amounts to a hill of beans. I think it was simply put there for the purpose of trying to avoid a legal situation."

District Court of the District of Columbia, so shows. There, after the contractor filed his suit in the Tax Court, defendant issued withholding orders which, as set forth in the court's opinion, filed March 18, 1947, and not yet reported, were:

> "(1) • • • not limited to sums due • • • upon subcontracts for Government work, but covered any sums due the plaintiff under any work, *commercial as well as Government;* and
>
> (2) • • • not limited to sums presently due but direct the withholding of all amounts due in the future • • •."

Whether the power is that broad, the court did not decide. It rejected, however, defendant's motion to dismiss. Whatever the ultimate answer may be, there can be no doubt about the position of the renegotiation authorities. As there stated by the court:

> "The Government concedes that the statute limits the withholding orders to concerns which have, or have had, contracts with the United States, but it says that the orders may cover any amounts due *upon any contracts*, Government or non-Government, from such concerns to their renegotiated subcontractors."

Manifestly, the threat which faces this appellant is as broad today as it was the day this suit was filed.

2. It Could Not Work Out Its Rights by Suit Elsewhere.

The suggestion (appellee's brief, p. 8) that there is a remedy by "action against a withholding contractor, or suit under the Tucker Act," is utterly without merit. The reasons why are set forth in the jurisdictional statement (pp. 23-24). Additionally, it should be noted:

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—(a) Certain Questions Admittedly Foreclosed in Such Other Suits.

As appellee's argument shows, appellant could not, in any such suggested suit, get a determination of the questions of "amount, coverage, and statutory construction." (See appellee's brief, p. 8.) They, it is said, are for the Tax Court. But in the present case those questions *could* be determined, so far as it might prove necessary to decide them to arrive at a decision. This is because equity, once taking jurisdiction, will decide all issues needful for a disposition of the case. (See cases set forth in the jurisdictional statement, p. 16.) But in any other forum, even appellee gives assurance that as to these questions there is (appellee's brief, p. 8) "a complete and final waiver." How then can it be asserted that elsewhere the remedy is "plain, adequate and complete"? 28 U. S. C. 384. "Where equity can give relief plaintiff **ought not to be compelled to speculate** upon the chance of his obtaining relief at law." *Davis v. Wakelee* (1895), 156 U. S. 680, 688. Plainly appellant brought its suit in the only court offering any hope for a full protection of its rights.

These questions, of course, could not be pertinent in any of the other renegotiation cases which have been here. Thus:

Coffman (1945), 323 U. S. 316, faced no such danger of a forum where he would be barred of some questions. To the contrary, he had a clear remedy under the statute—a different one than that here involved—or by direct suit against his customer where, without loss of rights, all questions would be open (p. 323).

Waterman (1946), 327 U. S. 540, was not faced with an order. His were only (p. 545) "future contingencies." Moreover, he brought no constitutional challenge to the statute; he accepted it. He, therefore, stood in no danger of losing something he did not claim.

Mine Safety (1945), 326 U. S. 371, did not raise the problem. However, the clear implication is that but for the agreement that defendant would, as he did, seize the funds—thus converting the suit into one to (p. 375) "reach money which the government owns,"—the case (p. 373) "Under our former decisions • • • would • • • have provided a basis for the equitable relief sought."

Aircraft and *Wade* had petitions pending in the Tax Court and thus put out of those cases the very issues which here arise. Whatever loss of rights that might entail, they already had incurred. Moreover, if, as appellee contends, only limited issues—aside from "amount, coverage, and statutory construction" (appellee's brief, p. 8)—could be open in a suit against the contractor, those issues in any event would be decided for *Aircraft* and *Wade* in the Tax Court. Thus all issues would, for them, ultimately be determined. To be sure, review of the Tax Court's decision might or might not be open—and constitutional rights might thus be gone—but that risk was one the litigants in those cases had already incurred.

This fatal flaw—of inability elsewhere to get **all** issues decided—afflicts even the suggestion that perhaps appellee, since he must either seize the company's funds in the hands of customers or sue appellant at law, may choose the latter course. But, in what is thus advertised as a single action at law, questions of "amount, coverage, and statutory construction" would not be open, appellee stoutly contends. These questions are said to be for the Tax Court. The consequence is that one unable, as this appellant, to go to the Tax Court because of attendant loss of rights, will be denied the right to get some of his questions answered unless he is willing to forego others. How then can an attempt to push a litigant from the only court which *can* decide all

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the questions involved, or so many as it may be necessary to decide, be justified on the ground that elsewhere he may be able to get some—but not all—of his questions decided?

But, even if all questions could so be raised and brought to an adjudication, a remedy, the choice of which rests with an adversary, can hardly be said to provide that full and certain remedy which this Court's decisions say it is the function of equity to dispense. " 'The remedy at law *cannot* be adequate if its adequacy depends upon the will of the opposing party.' " *American Life Insurance Co. v. Stewart* (1937), 300 U. S. 203, 215.

—(b) Even If Open, Other Questions beyond Possibility of Decision.

Even if all questions were open, suits against customers—who number in the thousands, are scattered through 47 states, and owe small amounts each—could not settle them.

For one thing, the decision on one point by any one court would not bind another.

For another, there never could be a decision whether too much had been taken. In each of the myriad of cases the court—assuming the statute to be valid—would be concerned only with the question whether the amount remaining to be recaptured, exceeded the amount for which suit was brought against the customer. Decision on that point in any one case could not be *res judicata* or otherwise binding in any other. The result would be that the entire amount would be taken without decision or opportunity for decision anywhere whether too much had been taken.

On this precise point the Court sustained jurisdiction against a similar assault in *Wilson v. Illinois Southern Railway Co.* (1924), 263 U. S. 574. As the Court said (p. 576):

"Assuming that * * * in such suits * * * plaintiffs, could set up the facts here relied upon * * * not only would those suits be many, but there would be insuperable

> difficulty in determining what the proper assessment against the whole road should be and in apportioning the due share to the county concerned. This difficulty *would recur in each of the five counties with not improbably different results in each.* It seems to us that the right of full defence in those suits, if it exists, is not an adequate remedy at law."

Even the theoretical possibility of a test suit is here illusory. One such is more likely to breed twenty. And no one who recalls the persistency with which government authority relitigates issues once settled, and the length to which it goes to develop a conflict—of which the tax cases are a notorious illustration (see Erwin N. Griswold, 57 HARVARD LAW REVIEW 1153)—can look to any one suit, unless it be in the equity court which can dispose of the whole controversy, with any expectation that it will settle his rights.[16] The indemnity provision of the statute, on the basis of which the Court thought it might be done in *Aircraft*, is expressly inapplicable here. The Congress said so. Section 403(c)(2), and Section 701(d) of the Revenue Act of 1943.

—(c) Tucker Act Remedies Cannot In This Case Provide Relief.

The tendered Tucker Act remedy is likewise valueless. Even if the other obstacles which confront appellant, already discussed, could be surmounted, appellant could not so obtain full relief.

So far as the District Court is concerned, the remedy by suit against the United States may be put aside because under the Tucker Act the District Court's jurisdiction is limited to $10,000. 28 U. S. C. 41(20). The tendered

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[16] Especially when the statute itself says "If any provision of this section or the application thereof *to any person* or circumstance is held invalid, the remainder of the section and the application of such provision *to other persons* or circumstances shall not be affected thereby." Section 403 (g).

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remedy thus subjects appellant to a ceiling wholly inadequate to accommodate the sum in controversy here.

So far as the Court of Claims is concerned, the possibility of remedy there is even more precarious. It is doubtful whether in the face of the statutory command putting decision first in the administrative officer and then in the Tax Court, without redetermination, Section 403(e)(1), "by any court or agency" the Court of Claims would, under any circumstances, have any jurisdiction whatever. Under like circumstances its jurisdiction has been denied. *United States v. Babcock* (1919), 250 U. S. 328; *John B. Kelly, Inc. v. United States* (1938), 87 Ct. Cl. 271, 276-7.

The reason is that in deciding whether to permit a recovery against itself the United States has a free hand. It is "under no obligation" to provide a remedy. *United States v. Babcock* (1919), 250 U. S. 328, 331. If, therefore, appellant is to have a remedy at all, it must be one to ward the blow **before** it falls. Once the money moves into the Treasury it well may be too late for *any* remedy. A whole new mass of rules then—because the claim would be against the sovereign—would come into play.

And certain it is that for such sums as appellee threatens to seize from customers, appellant could have no remedy in the Court of Claims. For such sums appellant has no contract with the United States. "Clearly the subcontractor could not recover this claim in a suit against the United States, for there was no express or implied contract between him and the Government." *United States v. Blair* (1944), 321 U. S. 730, 737.

Moreover, there can in no event be a recovery against the United States for tortious acts of its officers.[17] *Hooe*

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[17] The lately enacted Federal Tort Claims Act of August 2, 1946, 28 U. S. C. 921, if otherwise applicable, gives appellant no help because the statute expressly excludes claims based on acts of a government employee "in the execution of a statute • • • whether or not such statute • • • be valid • • •." 28 U. S. C. 943.

v. United States (1910), 218 U. S. 322, *United States v. Goltra* (1941), 312 U. S. 203. As the Court said in *Goltra* (p. 208):

> "Acts of government officials in taking property without authorization of Congress [and if the statute be invalid it is no law at all] confer no right of recovery upon the injured citizen."

Unless here, appellant is remediless. Even appellee suggests nothing to be had elsewhere save at the cost of essential rights. This Court, however, and the District Court, can stay appellee's hand and thus *prevent* happening that which once brought about would encompass appellant in irretrievable loss of rights.

III. SUIT IS NOT ONE AGAINST UNITED STATES.

One final point appellee makes. He says (appellee's brief, p. 10) the suit is one "against the United States to which the United States has not consented."

Either the case, as suggested in *Mine Safety* (1945), 326 U. S. 371, is one where it must be assumed (p. 374) "for the purpose of disposing of the jurisdictional issue, • • • that the Renegotiation Act is unconstitutional" or, as suggested in *Land v. Dollar* (1947), 67 Sup. Ct. 1009, 91 Law ed. Adv. Op. 903, decided April 7, 1947, it is one "where the question of jurisdiction is dependent on decision of the merits." If the former, and it is assumed the statute is unconstitutional, then appellee stands "stripped of his official character • • •, confessing a personal violation of the plaintiff's rights • • •," *Poindexter v. Greenhow* (1884), 114 U. S. 270, 288. If the latter, then, since the statute, for the reasons set forth in the jurisdictional statement (pp. 12-17), is plainly invalid, the wrong again is a personal one.

Mine Safety (1945), 326 U. S. 371, of course, does not control this case. There plaintiff *stipulated* that defendant should seize the funds—as he did. There remained nothing

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for the Court to do but dismiss. Here, as even appellee's argument shows there is little, if anything, owing to appellant from the United States. The threat is, as declared by appellee, to seize funds which "otherwise"—that is, but for the statute on which appellee relies—are concededly appellant's property.

The case is plainly the classic one for equity's protection. *Mulford v. Smith* (1939), 307 U. S. 38; *Allen v. Regents* (1938), 304 U. S. 439, 448; *Wickard v. Filburn* (1942), 317 U. S. 111.

CONCLUSION.

This case raises grave questions which desperately need the consideration of this Court. The motions to dismiss or affirm should be rejected, jurisdiction noted, and the case placed upon the general docket so that those questions may here be examined and right be done.

Respectfully submitted,

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